IN RE ARBITRATION BETWEEN:

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFSCME COUNCIL 5

and

STATE OF MINNESOTA, DEP'T OF MILITARY AFFAIRS

DECISION AND AWARD OF ARBITRATOR

BMS 15-PA-0725

JEFFREY W. JACOBS

ARBITRATOR

October 19, 2016

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case #'s 15-PA-0725
Amy Lovgren grievance

State of Minnesota

APPEARANCES:

FOR THE UNION:
Amanda Prince, Union Field Representative
Amy Lovgren, Grievant

FOR THE STATE:
Carolyn Trevis, Assistant State Negotiator
Roxanne Kronick, HR Dir. Dep't of Military Affairs

PRELIMINARY STATEMENT

The hearing in the above matter was held on October 11, 2016 at the BMS in St. Paul, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The matter was bifurcated on the question of procedural arbitrability and timeliness. This award is on that limited question.

ISSUES PRESENTED

The parties stipulated to the issues as follows: is the grievance procedurally arbitrable?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2013 to June 30, 2015. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 17 – GRIEVANCE PROCEDURE

Step 4 If the grievance remains unresolved after the response of the Appointing Authority is due, the Union shall have sixty (60 calendar days in which to submit a letter to the State Negotiator and the Appointing Authority stating its desire to proceed to arbitration. …"

Section 5. Arbitrator's Authority

The arbitrator shall have no right to amend, modify, nullify, ignore add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specified issue or issues submitted to him/her in writing by the parties of this Agreement and shall have no authority to make a decision on any other matter not so submitted to him/her. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's' interpretation and application of the expressed terms of this Agreement and to the facts of the grievance presented.

Section 6. Time Limits

> If a grievance is not presented within the time limits set forth above or the time limits set forth in a Supplemental Agreement, it shall be considered "waived." If a grievance is not appealed to the next step or steps within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Appointing Authority's last answer.

STATE'S POSITION:

The State's position was that the matter is barred by the terms of the grievance procedure as untimely and improperly filed. In support of this position the State made the following contentions:

1. The State argued that the terms of the grievance procedure are clear and unambiguous and call for the appeal from Step 3 to Step 4 to be done within 60 calendar days from the response from the step 3 grievance meeting.

2. The State noted that the initial grievance was filed and the parties proceeded through the appropriate steps of the grievance procedure to Step 3. That meeting was held on May 7, 2014 and Ms. Kronick's Step 3 response was sent to the union on May 13, 2014. See, State Exhibits B and C.

3. The State argued that the 60th day within which to submit the union's answer fell on July 13, 2014. The State argued that it carefully counted the days and there is no question that the 60th day fell on July 13th. The union's response was dated and submitted on July 14, 2014 – one day later.

4. The State argued that while one day may seem minor it is not and the State has always enforced it times limits very strictly. This is due to the large number of grievances filed with the State by unions and that if the time limits are not strictly enforced, the grievance process will become unpredictable and unmanageable.

5. The State also noted that the 60-day time limit in the AFSCME contract is much longer than in most other contracts between the State and its various unions – some are as short as 15 days. There was thus ample time for the union to appeal this and no reason given as to why it waited until he last moment to send a simple letter appealing the matter to arbitration.

6. The State further asserted that there was no extension granted, or even requested by the union. Thus, the step 4 appeal was untimely and pursuant to the clear terms of the Article 17 set forth above, the matter was considered settled based on the last answer of management.

7. The State asserted that timeliness has been arbitrated more than 20 times in the past 40 years and in each of these cases the State has taken the very clear position that the time limits set forth in the grievance procedure are essentially jurisdictional and strictly enforced.

8. The State cited several arbitral awards, two by the undersigned, that have dismissed grievances on timeliness grounds. In the Miller award, *State of Minnesota and AFSCME Council 6*, (1993) the arbitrator dismissed an appeal that was late even though it was caused by simple human error and inadvertence. There the union argued that there was no prejudice shown due to the late appeal but the arbitrator ruled that he had no power to alter the terms of the grievance procedure.

9. In the two matters submitted to the undersigned, the matters were both dismissed as untimely. In *AFSCME Council 6 and State of Minnesota, Brainerd RTC*, BMS 00-PA-116 (Jacobs 2000) the union argued that the grievant was so distraught that he was unaware that he had been fired and was unable to even deal with the reality of it all. That proved to be an unpersuasive argument and the matter was dismissed as untimely.

10. In *AFSCME Council 6 and State of Minnesota, St. Peter RTC*, BMS 03-PA-0684 (Jacobs 2003) the union failed to file the grievance in a timely fashion even though it was apparent what the State's position was regarding back pay for an employee who had been placed on administrative leave due to an investigation by the DHS.

11. Finally, in *State of Minnesota, Dep't of Corrections, and SRSEA*, BMS 07-PA-0788 (Bognanno 2007), the appeal was dismissed because even though timely submitted to various other places and despite the finding that the State knew that the union desired to appeal the matter to arbitration, it had been filed with the wrong office.

12. The State argued that these cases all support the strict enforcement of time and filing requirements and that all of the unions that have contracts with the State of Minnesota are well aware of the need to be timely or face the result that an arbitrator will find their grievances settled based on the last answer of the State.

13. The State argued that this is a simple case of an untimely filing by one day, but that whether the matter is one day late or more does not matter – the appeal and must be dismissed. 60 calendar days means 60 calendar days – not 61.

The State seeks an award denying the grievance in its entirety.

UNION'S POSITION

The Union's position was that the matter is arbitrable on the merits and was properly and timely filed. In support of this position the Union made the following contentions:

1. The union argued that the matter is timely and that the 60th day fell on a Sunday. Using the well-established rules of interpretation, when the last day of a prescribed time limit falls on a Sunday, Saturday or legal holiday, that day is not counted.

2. The union also argued that it filed the appeal letter on Monday July 14, 2014 and that this fell within the time frames even though the 60th day was a Sunday. See union exhibits 9 and 21. That letter was sent by e-mail to the State and the union asserted that there was no indication that it was not received that day, thus, the next calendar day that is not a Saturday, Sunday or legal holiday, this was timely filed.

3. The union also argued that this grievance involves more than just this individual grievant and is now in effect a class action. See Union exhibit 11. Tus, it is crucial that the matter be heard on the merits in order to bring closure to an underlying dispute over important contractual language that could well impact a large number of employees.

The Union seeks an award determining that the matter is procedurally arbitrable and should be heard on the merits.

DISCUSSION

FACTUAL BACKGROUND

The underlying facts on the limited question of whether the matter is timely were straightforward. No consideration of the merits or underlying contractual language having to do with the merits was made. This decision was exclusively over whether the matter was procedurally arbitrable and timely under the somewhat unique facts of this case.

The grievance was filed on April 25, 2014 claiming certain benefits for the grievant over the issue of vacation accruals upon a military leave.[1] The grievance was denied a Step 1 of the grievance steps and the parties moved the matter to Step 3 of the grievance procedure. The Step 3 grievance meeting was held on May 7, 2014 and Ms. Kronick testified credibly that she took contemporaneous notes of that meeting and wrote a note to herself that the matter needed a response by May 14, 2014.

She sent the Step 3 response on May 13, 2014 denying the grievance. See State Exhibit C. That would thus have given the union 60 calendar days within which to submit an appeal to Step 4, arbitration, to the appropriate individuals at the State. Sixty calendar days from that date however, fell on July 13, 2014, a Sunday.

The union e-mailed their appeal to arbitration pursuant to Step 4 of the grievance procedure on July 14, 2014. See State Exhibit D. This was apparently both e-mailed and sent by US Mail on July 14, 2014. The State received the hard copy on July 15, 2014 and the letter was appropriately date stamped. There was no question on this record though that the State received it on July 14, 2014. There was also no issue as to whether the letter was sent to the appropriate office and that it was a clear request for arbitration under the grievance procedure.

[1] As stated at the hearing, no decision whatsoever was made on the merits of this grievance and some exhibits were withdrawn or removed from consideration since they appeared to go to the merits of the case. This matter is limited exclusively to whether the grievance appeal to arbitration was timely and can even be considered on the substantive issues.

The State denied the grievance as untimely by letter dated July 25, 2014, State Exhibit E. There was thus no question of a waiver of the timeliness defense by the State. There was also no extension of the time limits set forth in Article 17. The issue now is whether the matter is timely as submitted on July 14, 2014.[2] It is to that limited question that the analysis turns.

THE UNION'S CLAIMS IN FAVOR OF TIMELINESS

The union raised several claims that the matter should be considered on the merits. Initially it should be noted that the union's claim that this is a "very important" grievance apparently affecting more than just this on grievant was unpersuasive and would not carry the day. As Arbitrator Miller ruled, if the matter is untimely the arbitrator is constrained by contract to deny the grievance on procedural grounds.

The union further argued that it was harmless error and that no prejudice was shown to have occurred due to the date of the filing. This too would not carry the day. As Arbitrator Miller ruled, if the matter is untimely; it is untimely and cannot contractually be considered by an arbitrator.

The union also argued that there is a strong policy in favor of hearing matters on the merits. This is certainly true. Old labor disputes rarely ever die; they just reappear again in different forums. However, even in the face of a strong policy to hear and decide matters on the merits, an arbitrator cannot simply ignore contractually agreed upon time limits.

Here the sole question is whether the submission of the Step 4 appeal on July 14, 2014 can still be considered timely since the 60th day fell on a Sunday. The union argued that since the 60th day fell on a Sunday it had until the following day to submit its grievance. It is to that claim the analysis turns.

[2] See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed at Section 5.7.A.iii, page 219 and fn. 104. Most arbitrators hold that timeliness most be raised early in the grievance process or that defense may be considered waived. See also, *Crestline Exempted Village Schools*, 111 LA 114 (Goldberg 1998). Here the State raised the issue almost immediately.

THE CONTRACT LANGUAGE

The language says "sixty (60) calendar days." There was little question that the term "calendar days" would include intervening Sundays, Saturdays and legal holidays. The thorny question is whether there is an intent to extend that time frame if, and only if, the last day falls on a legal holiday, Saturday or a Sunday. There is little contractual guidance on this question in the labor agreement.[3] The State argued that 60 means 60 and that it matters not if that last day falls on a Saturday a Sunday or a legal holiday. The union, it asserted, could have sent the appeal by e-mail on Sunday July 13th.

The problem with that argument is that it might well then constitute an amendment of the agreement to force the union to submit the appeal letter on the 58th or even the 57th day depending on how close that last day falls in relation to a weekend or legal holiday. As discussed below, while e-mail is certainly available almost 24-7 and is a ubiquitous form of communication, and the "norms" of the American workplace are clearly changing from what was once a Monday through Friday 9 to 5 work day, at least for office work, generally people do not work on a Sunday in this field.[4] The statutes and rules cited herein give effect to that general understanding. Further, there is nothing in the contract that clearly obviated that.

PRIOR ARBITRAL CASES

The State provided prior cases that have upheld the strict time limits. There is little question that the State has held the unions with which it has collective bargaining agreements to very strict time limits set forth in the grievance procedures and has denied grievances if they are untimely. None of the cited cases involved this exact scenario however; i.e. where the last day of a prescribed time limit falls on a legal holiday, a Saturday or a Sunday.

[3] There was also surprisingly little guidance from the arbitral literature on this question as well. Despite a diligent search no cases could be found that were directly on point with the limited issue presented here, i.e. can 60 mean 61 if 60 falls on a Sunday. As discussed below, none of the cases cited by the State here were directly on point on that question.

[4] As some commentators have observed, "should supply a term which comports with community standards of fairness and policy..." Murray on Contracts, 3rd Edition, at page 441.

The Miller award involved a situation where the union clearly filed its appeal late but argued that there was no prejudice and that the error was due to inadvertence and was not intentional. He correctly ruled in favor of the State in that case and noted that whether it was due to simple human error, in that case by simply forgetting to send the appeal letter, the arbitrator's jurisdiction was constrained by the terms of the grievance procedure.

In the Brainerd RTC case decided by the undersigned, the argument was that the grievant, who had been terminated was unable to fully understand his situation due to some sort of mental deficiency and that the time for *starting* the count for the appropriate number of days should be delayed until he did. That presented a very different issue and was also decided on the grounds that the grievant's argument in that case was simply unpersuasive on those facts.

Likewise, the St. Peter RTC case, also decided by the undersigned presented a different facts scenarios and again was in effect "when does the time start." See Slip op at page 11. That is not what is at issue here. The question here is not when the time starts for purposes of commencing the "count," but rather when does it end – admittedly in a very limited scenario

Lastly, the Bognanno decision involved a different issue in that the question was not so much the time but sending the appeal to the incorrect office. He ruled that the language required that the appeal letter be sent to a particular office and the fact that it was not proved fatal to the union's case.

This case is different from any of those. While the state argued that there have been many cases decided that have upheld the strict enforcement of the time limits, none involving this scenario were cited by the parties. Accordingly, since there is very little guidance on this particular specific question in the language or in the cases decided under that language some resort to external sources was necessary to aid in this determination.

EXTERNAL SOURCES FOR GUIDANCE

Here it was found to be appropriate to consult sources for computing time in legal documents and other statutory and regulatory schemes, especially since the State of Minnesota was involved in this as party. It was helpful in determining the intent of this language to look to how time is computed under State law and rule.

As Arbitrator Carlton Snow pointed out in Section 2.15 of the *Common Law of the Workplace*, "an interpretation giving a contractual term a lawful meaning is preferable to one that makes an agreement unlawful. In the absence of clear direction from the contract or parties, arbitrators are otherwise divided on whether they should consider external law in applying a collective bargaining agreement." *Common Law of the Workplace Section* 2.15 at page 83.

Elkouri has also observed that "arbitrators often construe collective bargaining agreements in light of statutes and case law, and may treat applicable regulations as implied terms of the contract." See, Elkouri and Elkouri, *How Arbitration Works*, 7th Ed. BNA Books. 2012 at .9.3.B.i, page 9-45. See also, footnote 224 on page 9-45 citing cases holding that an arbitrator has the authority to address external law and that where a contract is silent on the question of whether external law can be consulted, an arbitrator can imply certain external law into a general contract provision. Application of external sources as an aid to interpreting this particular provision as applied to these particular facts was thus appropriate and necessary to give effect to the parties' intent. Those considerations pointed in the union's direction on these facts.

The analysis then turned to pertinent statutory and/or regulatory pronouncements that might provide guidance on the question presented here.

Minnesota law is clear on the question of how time is to be computed where the last day of a prescribed time limit falls on a Saturday, a legal holiday or a Sunday. While there was no sense that the contract here would be in violation of law if the ruling was in favor of the State, an interpretation which is consistent with State law appeared far more appropriate than one that is contrary to it.

Minnesota statute provides as follows:

645.15 COMPUTATION OF TIME.

Where the performance or doing of any act, duty, matter, payment, or thing is ordered or directed, and the period of time or duration for the performance or doing thereof is prescribed and fixed by law, the time, except as otherwise provided in sections 645.13 and 645.14, shall be computed so as to exclude the first and include the last day of the prescribed or fixed period or duration of time. *When the last day of the period falls on Saturday, Sunday, or a legal holiday, that day shall be omitted from the computation.* (Emphasis added).

In addition, Minnesota Statute provides as follows:

645.151 TIMELY DELIVERY OR FILING.

When an application, payment, return, claim, statement, or other document is to be delivered to or filed with a department, agency, or instrumentality of this state or of a political subdivision on or before a prescribed date and the prescribed date falls on a Saturday, Sunday, or legal holiday, *it is timely delivered or filed if it is delivered or filed on the next succeeding day which is not a Saturday, Sunday, or legal holiday.* (Emphasis added).

Further, both the Federal Rules of Civil procedure as well as the Minnesota Rules of Civil procedure contain similar provisions. Rule 26 of the Federal Rules of Civil procedure provides in relevant part as follows:

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

Rule 26, Computing and Extending Time

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.[5]

The Minnesota Rules of Civil procedure also provides as follows:

[5] See also Rule 9006 of the Federal Bankruptcy Rules as well. Virtually all such time computation rules exclude Sundays from the calculation of time limits.

6.01 Computation

(a) Computation of Time Periods. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is:

(1) Saturday,

(2) Sunday,

(3) a legal holiday. (Emphasis added).

While these rules pertain to Court orders, (which are also quite strict in their interpretation of time limits generally, since missing a time deadline for an appeal to the Court of Appeals for example results in dismissal of the appeal) they mirror statutory law as set forth above and provide guidance as to the intent of the 60 calendar day provision in Article 17 of the parties' contract. Further, there is a strong policy in favor of interpreting labor agreements consistently with existing law unless there is a clear intent to do otherwise.[6]

It is generally well accepted that where a contractual provision is susceptible to two interpretations, one compatible with and the other repugnant to, an applicable statute, the statute is a relevant consideration in interpreting the language, and arbitrators should seek to avoid an interpretation that would make the agreement invalid.

Here there was clear evidence that the parties have adhered strictly to the time limits set forth in the grievance procedure and that there were many reasons to do so. This stemmed in large part from the sheer volume of grievances filed with the State of Minnesota and the need to maintain an orderly and predictable system of processing them.

This result though will not disturb that need or that system of strict enforcement. It merely means that the CBA should be interpreted consistent with other existing state laws and regulations governing the computation of time.

[6] Elkouri, 7th Ed at 9.3.B.1 at pages 9-4 and 9-45. Federal law also provides some guidance in certain cases. For example, it is well-known that IRS rules allow for taxpayers to submit their taxes on the Monday following April 15th if that day falls on a Saturday or Sunday.

There was no issue that interpreting the language as the State wants would make the agreement invalid, but it would be inconsistent with the State law on general computation of time, applicable to other sorts of contracts and time limits, as well as both federal and state rules applicable to the Court system, as noted above. The interpretation sought by the union in this unique instance would be more consistent with those laws and rules.

Leaving aside the issue of whether to apply external law as an aid in interpreting this particular labor agreement, there was an issue as to whether a ruling one way or the other would effectively amend the contract. The State argued that interpreting the language to allow 61 days in this instance would be an impermissible amendment to the language but so too would a ruling in the State's favor – in the other direction.

Ruling that this grievance was untimely would in effect be an amendment to the parties' agreed upon 60-day limitation to require something less than 60 days. Here that would in effect be a requirement that the appeal to Step 4 be done within 58 days, i.e. by Friday July 11, 2014. That too would be inappropriate.

Obviously, had the 60th day here fallen on a day other than Saturday, Sunday or legal holiday and the union had filed its Step 4 appeal even one day late, the result would be clear and the matter would have been time barred and non-arbitrable. Here though there was no question that the union filed this on the Monday immediately following the Sunday that was the 60th day. Consistent with the statutory citations above, and on this quite unique record, the union's arguments in favor of a timely appeal were persuasive. Accordingly, the matter is timely and can be considered on the merits.

AWARD

The grievance is found to be timely and will proceed to a hearing on the merits.

Dated: October 19, 2016

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Jeffrey W. Jacobs, arbitrator